

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Reexamination of Roaming Obligations of	)	WT Docket No. 05-265
Commercial Mobile Radio Service Providers	)	
	)	
Automatic and Manual Roaming Obligations	)	WT Docket No. 00-193
Pertaining to Commercial Mobile Radio Services	)	

To: The Commission

**JOINT COMMENTS  
OF  
AIRPEAK COMMUNICATIONS, LLC  
AND  
AIRTEL WIRELESS, LLC**

AIRPEAK Communications, LLC (“AIRPEAK”) and Airtel Wireless, LLC (“Airtel”) (AIRPEAK and Airtel each, individually, a “Company” and, collectively, the “Companies”), by their attorneys and pursuant to Section 1.415 of the Federal Communications Commission (“FCC” or “Commission”) Rules and Regulations, respectfully submit their comments in the above-entitled proceeding.<sup>1</sup> In this proceeding, the Commission has terminated its previous inquiry into the automatic and manual roaming obligations of Commercial Mobile Radio Service (CMRS) providers,<sup>2</sup> but has initiated a new investigation to determine whether its existing roaming rules should be modified in light of the current status of the CMRS industry and the

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<sup>1</sup> In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, *Notice of Proposed Rulemaking*, WT Docket No. 05-265, FCC 05-160, released August 31, 2005 (“Notice” or “NPR”).

<sup>2</sup> In the Matter of Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services, *Memorandum Opinion and Order*, WT Docket No. 00-193, FCC 05-160, released August 31, 200 (“MO&O”).

needs of subscribers to such services.<sup>3</sup> The instant proceeding is intended to provide the Commission with a refreshed record on which it can base such a determination.

The Companies applaud the FCC's decision to revisit this issue. The Commission is correct to recognize that it must consider "current technological and market conditions"<sup>4</sup> before determining what roaming rights and obligations should be imposed on a CMRS industry that has been transformed in the half-decade since the FCC previously considered this matter. For the reasons described below, the Companies believe the FCC should determine that the CMRS marketplace will not ensure the development of nationwide, ubiquitous and competitive wireless voice telecommunications.<sup>5</sup> The Commission's rules should be modified to provide CMRS operators with automatic and manual roaming rights consistent with their Title II right to non-discriminatory interconnection with other carriers.<sup>6</sup>

## **I INTRODUCTION**

ARPEAK and Airtel are part of a shrinking universe of small, independent CMRS providers in a marketplace that increasingly is characterized by mergers, even of mega-carriers.<sup>7</sup> Each of the Companies operates a network that would fall into the very bottom of the Tier III CMRS carrier classification in terms of number of subscribers as neither serves more than 15,000 subscriber units.<sup>8</sup> AIRPEAK's operations currently are focused on markets in the states of Nevada, New Mexico and Washington, including service in cities such as Spokane, WA with a population of under 200,000 and Kennewick, WA with a population of only some 60,000. Airtel operates exclusively in the State of Montana which has a total population of slightly more

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<sup>3</sup> NPR at ¶ 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at ¶ 5.

<sup>6</sup> See 47 C.F.R. § 20.11.

<sup>7</sup> See e.g., mergers between AT&T Wireless and Cingular, ALLTEL and Western Wireless, and Sprint and Nextel.

<sup>8</sup> See Revisions of the Commission's Rules to Ensure Compatibility with Enhanced 911 Calling Systems, Phase II Compliance Deadlines for Non-nationwide Carriers, CC Docket No. 94-102, *Order to Stay*, 17 FCC Rcd 14841, 14848 (2002).

than 900,000. Thus, by any standard, the Companies provide service to the smallest of the nation's urban communities and the rural areas that surround them.

The Companies not only serve subscribers in smaller, less urban markets, but use a technology that is deployed by only three other CMRS providers in the Continental United States. Both operate iDEN-derivative Harmony systems, an exclusively 800/900 MHz technology that is entirely compatible with the iDEN technology used by Sprint Nextel Corporation, Nextel Partners, Inc. (collectively "Nextel")<sup>9</sup> and Southern Communications Services, Inc. d/b/a SouthernLINC Wireless ("SouthernLINC"). Since SouthernLINC operates only in limited portions of the Southeastern United States, a section of the country far removed from the Companies' operations, and Nextel holds virtually all 800/900 MHz spectrum that could be used to deploy iDEN technology throughout the rest of the nation, there effectively is only a single entity with which either of the Companies could establish a roaming arrangement.<sup>10</sup> Because the Companies agree with the FCC that roaming is a key element in a ubiquitous, competitive CMRS marketplace, and because current CMRS marketplace conditions, at least in the iDEN marketplace, are highly concentrated and not conducive to voluntary roaming arrangements, AIRPEAK and Airtel welcome the Commission's investigation into this matter.

## **II BACKGROUND**

The Notice describes roaming as follows: Roaming occurs when the subscriber of one CMRS provider utilizes the facilities of another CMRS provider with which the subscriber has no direct pre-existing service or financial relationship to place an outgoing call, to receive an

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<sup>9</sup> These two companies constitute a single entity for these purposes as evidenced by the record in WT Docket No. 02-55. Nextel Partners acquired licenses from Sprint Nextel to provide iDEN service in less populated parts of the country and, to the best of the Companies' knowledge, has never taken a regulatory position distinct from that of its creator. Recent press articles indicate that it is likely Sprint Nextel will be acquiring its progeny in the near term future. Thus, for purposes of this proceeding, the Companies will treat the two companies as a single entity.

<sup>10</sup> The Companies already have established mutual roaming rights and procedures with one another, but the very limited geographic scope of their operations means that there are few opportunities for their subscribers to take advantage of roaming opportunities.

incoming call, or to continue an in-progress call.<sup>11</sup> It further explains that roaming is possible only when the subscriber has a handset that is capable of accessing the host system; that is, the system on which it wishes to roam.<sup>12</sup> It notes that the FCC previously concluded that roaming is a common carrier service, thereby subjecting CMRS providers to the obligations contained in Title II of the Communications Act.<sup>13</sup> As a Title II service, complaints and enforcement actions relating to unjust and unreasonable charges, practices, or discriminatory conduct by CMRS carriers in relation to roaming services are governed by the Title II complaint process.<sup>14</sup>

The NPR also describes the two types of roaming: manual and automatic. It explains that manual is a relatively primitive form of roaming in which the subscriber first must establish a relationship with the host provider in order to make a call.<sup>15</sup> By contrast, in an automatic roaming arrangement the subscriber is able to use the host network to make and terminate calls without making any special arrangement with the host operator. Of course, this is possible only because the subscriber's home and host providers have established a pre-existing contractual agreement.<sup>16</sup>

The FCC adopted rules establishing manual, but not automatic, roaming obligations for cellular operators in 1981<sup>17</sup> and extended that rule to include other CMRS providers in 1996.<sup>18</sup> At the time the requirement was extended to all CMRS systems, the Commission was uncertain whether it would need to establish automatic roaming obligations. It tentatively concluded that a robustly competitive marketplace might make automatic provisions unnecessary after the last

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<sup>11</sup> NPR at ¶ 2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at ¶ 3.

<sup>16</sup> *Id.*

<sup>17</sup> *See Report and Order*, CC Docket No. 79-318; *see also* 47 C.F.R. § 22.911(b).

<sup>18</sup> *See Second Report and Order*, CC Docket No. 79-318; *see also* 47 C.F.R. § 20.12.

group of initial broadband PCS licenses was awarded, and even questioned whether all roaming rules, manual and automatic, should sunset at that time.<sup>19</sup>

The Commission revisited reconsideration petitions in respect to the manual roaming rules in July 2000.<sup>20</sup> The FCC reaffirmed those rules, expanded their applicability to data as well as voice services, and terminated the proceeding because changes in the marketplace made the record stale. Later that same year the Commission initiated a new proceeding regarding CMRS roaming.<sup>21</sup> In that proceeding, the agency reaffirmed that ubiquitous roaming was an important element in the development of a seamless, nationwide network, but also determined that rules requiring roaming would be contrary to the public interest if competitive market forces eliminated the likelihood of discrimination in roaming activities. It thus concluded that a regulatory mandate in support of roaming would be appropriate only to the extent that “market forces alone are not sufficient to ensure the widespread availability of competitive roaming services and where roaming is technically feasible without imposing unreasonable costs on CMRS providers.”<sup>22</sup>

The Companies agree with the FCC’s reasoning. Rules governing roaming rights and obligations, like other regulatory requirements, are appropriate and necessary to protect the public interest only when the marketplace is unlikely to or has proven incapable of protecting those rights. For the reasons detailed below, AIRPEAK and Airtel believe that the current CMRS market forces, at least within the marketplace of iDEN networks in which they operate, are not adequate to ensure roaming opportunities on a non-discriminatory basis under reasonable

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<sup>19</sup> See Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Service, WT Docket No. 00-193, *Notice of Proposed Rulemaking*, 15 FCC Rcd 21628, 21639 (2000).

<sup>20</sup> *Id.*

<sup>21</sup> See Interconnection and Resale Obligations Pertaining to Commercial Mobile Service Providers, CC Docket No. 94-54, *Second Report and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 9462, 9464 (1996).

<sup>22</sup> See Interconnection and Resale Obligations Pertaining to Commercial Mobile Service Providers, CC Docket No. 94-54, *Second Report and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 9462, 9464 (1996).

terms and conditions. Thus, the Companies urge the FCC to adopt the recommendations below, at least in respect to iDEN CMRS providers.

### **III CURRENT IDEN MARKET FORCES DO NOT PROMOTE ROAMING AND, THEREBY, A UBIQUITOUS, COMPETITIVE CMRS MARKETPLACE FOR IDEN SUBSCRIBERS.**

The Commission's decision to revisit CMRS roaming is related directly to the recent, rapid consolidation of this marketplace. The significant majority of smaller, independent operators have been acquired by regional or national entities over the past decade and there even has been substantial consolidation among industry behemoths. The Companies accept the Commission's determinations that none of these mergers represent an anti-competitive concern and that the public interest will continue to be served by the remaining level of competition. However, the resultant marketplace leaves decisions such as whether or not to engage in reciprocal roaming arrangements in the hands of a small number of entities. A decision by even a few companies not to enter into such agreements would have a profound effect on the FCC's determination that roaming serves an important public interest.

This situation is magnified in the iDEN environment. Sprint Nextel dominates the deployment of this technology to an extent unmatched by users of other CMRS technologies. There is no viable, alternative partner if Sprint Nextel should decline to permit the Companies' subscribers to roam onto its network. This is a matter of significant concern given SouthernLINC's difficulties when it attempted to negotiate a roaming agreement with Sprint Nextel and Sprint Nextel's response to Airtel's more recent roaming request. While Sprint Nextel ultimately did reach an agreement with SouthernLINC, the Companies understand that the process was lengthy, arduous, costly and permits roaming only for cellular telephone service,

not the push-to-talk DirectConnect feature that distinguishes iDEN from other cellular technologies.<sup>23</sup>

Airtel was unable to achieve even that level of roaming rights with Sprint Nextel -- despite the fact that Sprint Nextel does not provide iDEN service at all in Montana, the only market in which Airtel operates. The arrangement Airtel was able to negotiate allows the Company to purchase prepaid service as a Sprint Nextel dealer and thereby provide Sprint Nextel SIM cards to the Company's subscribers when they travel outside of Montana. Each subscriber has to remove its Airtel SIM card when it leaves the state, replace it with a Sprint Nextel card, and remember to reverse the process when the subscriber returns to the state. It is not even clear that this constitutes "roaming" in the sense of this proceeding as subscribers are not able to retain their Airtel phone number when operating outside of the state, but are assigned a different Sprint Nextel number. This arrangement is even more primitive and cumbersome than the manual roaming approach defined in the NPR. It is reflective of the parties' respective market power and bargaining positions. Moreover, AIRPEAK never received a response to its requests to initiate negotiation of a domestic roaming agreement.

More surprising, the relationship agreed to by Sprint Nextel does not give its own subscribers the ability to roam on Airtel's network when they are in Montana. Sprint Nextel has never provided iDEN service in Airtel's markets and there is no indication that it is likely to do so in the foreseeable future. Yet it declined to pursue negotiations that would create any type of reciprocal roaming arrangement. While the number of such Sprint Nextel customers likely is small, the absence of any interest in striking an agreement that would provide them with iDEN

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<sup>23</sup> NPR at ¶ 15.

service when in Montana seemingly is contrary to Sprint Nextel's own economic interest and is reason to question the workings of the iDEN marketplace.<sup>24</sup>

These experiences of Airtel and SouthernLINC support a conclusion that roaming is not always a self-regulating process. The Commission's rules should affirm that automatic and manual roaming are CMRS rights, enforceable under Title II of the Communications Act.

#### **IV THE RULES SHOULD REQUIRE CMRS OPERATORS TO ENGAGE IN GOOD FAITH NEGOTIATIONS RELATING TO OUT-OF-MARKET RECIPROCAL ROAMING RIGHTS FOR ALL TECHNICALLY FEASIBLE VOICE, DATA AND OTHER SERVICES.**

Section 201(a) of the Communications Act requires common carriers, including CMRS carriers, to provide service "upon reasonable request."<sup>25</sup> Section 201(b) requires that all charges, practices, classifications and regulations for such service be just and reasonable.<sup>26</sup> Further, Section 202(a) precludes unjust or unreasonable discrimination in the provision of such services and prohibits undue or unreasonable preferences or advantages.<sup>27</sup> These obligations are designed not for the protection of competitors, but to ensure that the benefits of fair competition flow to the subscribers of their systems.

These requirements should apply to roaming service just as they do to other common carrier offerings. Of course, the Companies agree that roaming rights should be available only if the roaming subscriber's handset is technically capable of accessing the host system. Further, they acknowledge that the carrier seeking roaming access has the burden of ensuring that there are no technical impediments and for developing and implementing technologies needed to

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<sup>24</sup> The Companies understand that Sprint Nextel has a more favorable, reciprocal roaming agreement with a Harmony service provider in Guam that operates under the name Choice Phone. The Companies have been unable to confirm the particular terms and conditions of that arrangement, but encourage the FCC to request that information from Sprint Nextel so the Commission can understand what terms Sprint Nextel finds technically and economically viable in at least one roaming agreement with a Harmony operator.

<sup>25</sup> 47 U.S.C. § 201(a).

<sup>26</sup> 47 U.S.C. § 201(b).

<sup>27</sup> 47 U.S.C. § 202(b).



surmount any such obstacles.<sup>28</sup> Indeed, AIRPEAK and Airtel believe that the technical complexities of “in-market” roaming (whereby subscribers are capable of roaming on a host system even in markets where their home provider offers service) are sufficiently challenging that they do not seek that right. However, given the roaming arrangement Sprint Nextel certainly has with Nextel Partners and presumptively has with Choice Phone, as well as the more limited roaming rights it has accorded SouthernLINC, there are no obvious technical impediments to it negotiating equitable, non-discriminatory agreements with AIRPEAK and Airtel. FCC adoption of rules that affirm these fundamental Title II rights will permit the Companies’ subscribers to enjoy roaming rights on reasonable terms and conditions despite Sprint Nextel’s historic resistance to such arrangements and the very unequal bargaining power of these entities.

## **V. CONCLUSION**

For the reasons detailed above, the Companies urge the FCC to adopt automatic roaming obligations for CMRS carriers, enforceable under Title II of the Communications Act.

Respectfully submitted,

/s/

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<sup>28</sup> NPR at ¶ 30.